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Venture SKL Sdn Bhd v Geonex (M) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02(NCvC)(W)-438–03 OF 2021
AZIZAH NAWAWI, AHMAD ZAIDI AND LIM CHONG FONG JJCA
17 MAY 2023

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Contract — Repudiation — Acceptance — Whether respondent repudiated contract when it told appellant mining operator to cease work and vacate land on misconception that its agreement with appellant was null and void — Whether facts showed that the agreement parties had signed was to subsist until it was replaced by a new one — Whether appellant's suit against respondent was a rescission of the contract as it amounted to an acceptance of the respondent's repudiatory breach

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In February 2016, the appellant and respondent signed an agreement under which the respondent appointed the appellant to carry out iron-ore mining on a piece of land. Following the signing of the agreement, the appellant and respondent held further discussions about the project including working on a new agreement to replace the one that they had signed. About seven months later, the respondent's solicitors wrote to the appellant to forthwith cease all work on the land until a new agreement between the parties had been signed. This was followed by another letter from the respondent giving the appellant two weeks' notice to vacate the land. The appellant replied that the February 2016 agreement that they had signed was valid and that the appellant was ready and willing to perform the agreement and did not wish to vacate the land. The respondent maintained that there was no valid agreement subsisting and proceeded to dismantle and remove some of the appellant's plant and machinery from the land. The appellant sued the respondent for, inter alia, a declaration that the February 2016 agreement was valid and in force, that the respondent's purported termination of the agreement was invalid; an injunction to restrain the respondent through its agents or servants from removing the appellant's plant and machinery from the land, an order giving the appellant reasonable time to remove its equipment from the land on its own without interference from the respondent and for damages. The respondent counterclaimed for the cost of storing the appellant's plant and machinery that had been removed from the land as well as for damages (to be assessed) in respect of the appellant's interference in the respondent's mining activity on the land. The High Court dismissed the appellant's suit and allowed the counterclaim. The court held that the appellant had failed to prove that the February 2016 agreement was valid and enforceable and also that the respondent had the right to remove the appellant's equipment from the land.

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Held, unanimously allowing the appeal:

(1) On the facts, it was plainly not in dispute that the parties had validly entered into the February 2016 agreement. The issue was whether that agreement was thereafter bilaterally declared null and void by the parties (see para 26).

(2) According to the respondent, the parties mutually agreed at their subsequent discussions that the agreement was to be treated as null and void and that a new agreement would be entered into. But the appellant contended that the agreement was to continue to be in force until a new one was executed (see para 27).

(3) Although the minutes of the meetings between the parties about the agreement revealed discussions about a new agreement to replace the February 2016 one, nothing was expressly concluded that that agreement was henceforth to be null and void. From the wordings used in the minutes of the meetings, the conduct of the parties and their discussions about other matters which were consistent with the ongoing performance of the agreement, as well as the testimony of the respondent's principal witness at the trial, this court found that the parties intended the agreement to be subsisting until it was replaced by a new one. The meetings showed that the onus was on the respondent to draft the new agreement but that was not done (see paras 28–29, 31, 34–36 & 38).

(4) The High Court judge misdirected himself in holding that the parties had mutually agreed to annul the agreement. The agreement subsisted and at all material times there was neither non-performance nor breach of the agreement by the appellant (see paras 37–38 & 40).

(5) The respondent repudiated the agreement when its solicitors instructed the appellant to cease work and vacate the land. The appellant had no option, after several attempts to resuscitate the contract between September 2016 and March 2018, but to rescind the agreement when it filed the action against the respondent. The appellant was entitled to compensatory damages pursuant to s 76 of the Contracts Act 1950. The High Court erred in allowing the respondent's counterclaim (see paras 42–45).

[Bahasa Malaysia summary

Pada Februari 2016, perayu dan responden menandatangani perjanjian di mana responden melantik perayu untuk menjalankan perlombongan bijih besi di atas sekeping tanah. Selepas menandatangani perjanjian tersebut, perayu dan responden mengadakan perbincangan lanjut mengenai projek tersebut termasuk mengusahakan perjanjian baharu untuk menggantikan perjanjian yang telah mereka tandatangani. Kira-kira tujuh bulan kemudian, peguamcara

responden menulis surat kepada perayu untuk menghentikan semua kerja di tanah tersebut sehingga perjanjian baharu antara pihak ditandatangani. Ini diikuti dengan satu lagi surat daripada responden yang memberi perayu notis dua minggu untuk mengosongkan tanah tersebut. Perayu menjawab bahawa perjanjian Februari 2016 yang telah mereka tandatangani adalah sah dan perayu bersedia dan mampu melaksanakan perjanjian tersebut serta tidak mahu mengosongkan tanah tersebut. Responden berpendapat bahawa tiada perjanjian yang sah wujud dan terus merobohkan dan mengalihkan beberapa loji dan jentera perayu dari tanah terebut. Perayu menyaman responden untuk, antara lain, satu deklarasi bahawa perjanjian Februari 2016 adalah sah dan berkuatkuasa, bahawa penamatan perjanjian yang dikatakan oleh responden adalah tidak sah; satu injunksi untuk menghalang responden melalui ejen atau pekerjanya daripada mengalihkan loji dan jentera perayu dari tanah, satu perintah yang memberi masa yang munasabah kepada perayu untuk mengeluarkan sendiri peralatannya dari tanah tanpa gangguan daripada responden dan untuk ganti rugi. Responden menuntut balas bagi kos penyimpanan loji dan jentera perayu yang telah dialihkan dari tanah serta untuk ganti rugi (untuk ditaksirkan) berkenaan dengan campur tangan perayu dalam aktiviti perlombongan responden di atas tanah tersebut. Mahkamah Tinggi menolak saman perayu dan membenarkan tuntutan balas. Mahkamah memutuskan bahawa perayu telah gagal membuktikan bahawa perjanjian Februari 2016 adalah sah dan boleh dikuatkuasakan dan juga bahawa responden mempunyai hak untuk mengalihkan peralatan perayu dari tanah tersebut.

Diputuskan, sebulat suara membenarkan rayuan:

(1) Dari segi fakta, jelas sekali tidak dipertikaikan bahawa pihak-pihak telah menandatangani perjanjian Februari 2016 secara sah. Isu adalah sama ada perjanjian tersebut selepas itu secara dua hala diisytiharkan batal dan tidak sah oleh pihak-pihak (lihat perenggan 26).

(2) Menurut responden, kedua-dua pihak bersetuju secara bersama pada perbincangan selanjutnya bahawa perjanjian tersebut akan dianggap sebagai batal dan tidak sah dan perjanjian baru akan dimasuki. Tetapi perayu berpendapat bahawa perjanjian tersebut akan terus berkuatkuasa sehingga perjanjian baharu dilaksanakan (lihat perenggan 27).

(3) Walaupun minit mesyuarat antara pihak mengenai perjanjian tersebut mendedahkan perbincangan mengenai perjanjian baharu untuk menggantikan perjanjian Februari 2016, tiada apa yang dimuktamadkan secara jelas bahawa perjanjian tersebut adalah terbatal dan tidak sah. Daripada perkataan yang digunakan dalam minit mesyuarat, kelakuan pihak-pihak dan perbincangan mereka tentang perkara-perkara lain yang konsisten dengan pelaksanaan perjanjian yang berterusan, serta keterangan saksi utama responden semasa perbicaraan, mahkamah ini

mendapati bahawa pihak-pihak berhasrat perjanjian tersebut akan berterusan sehingga ia digantikan dengan yang baru. Mesyuarat menunjukkan bahawa beban berada pada responden untuk merangka perjanjian baru tetapi ianya tidak dilakukan (lihat perenggan 28–29, 31, 34–36 & 38).

(4) Hakim Mahkamah Tinggi tersalah arah dalam memutuskan bahawa pihak-pihak telah bersetuju secara bersama untuk membatalkan perjanjian tersebut. Perjanjian tersebut masih wujud dan pada setiap masa yang material tidak terdapat ketidaklaksanaan mahupun pelanggaran perjanjian oleh perayu (lihat perenggan 37–38 & 40).

(5) Responden menafikan kesahan perjanjian tersebut apabila peguamcaranya mengarahkan perayu untuk menghentikan kerja dan mengosongkan tanah. Perayu tidak mempunyai pilihan, selepas beberapa percubaan untuk menghidupkan semula kontrak antara September 2016 dan Mac 2018, tetapi untuk membatalkan perjanjian apabila ia memfailkan tindakan terhadap responden. Perayu berhak mendapat ganti rugi pampasan menurut s 76 Akta Kontrak 1950. Mahkamah Tinggi terkhilaf dalam membenarkan tuntutan balas responden (lihat perenggan 42–45).]

Cases referred to

Ahmad Najib bin Aris v Public Prosecutor [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697; [2007] 6 CLJ 93, FC (refd)

Marappan a/l Muthusamy v R Sivam a/l Ramasamy [2014] 4 MLJ 428, CA (refd)

Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291; [1985] 1 CLJ 541, SC (refd)

Tengah Oil and Gas International Pte Ltd v Seawealth Nautical Sdn Bhd & Anor [2011] 11 MLRH 66, HC (refd)

Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 5 MLJ 662, CA (refd)

UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Contracts Act 1950 s 76
Evidence Act 1950 ss 94, 114(g)

Appeal from: Suit No CA-22NCvC-36–07 of 2018 (High Court, Kuala Lumpur)

Kamalanathan Ratnam (with Vinod a/l R Kamalanathan) (Vinod Kamalanathan & Assoc) for the appellant.
Lee Shu Min (Seah Balan Ravi & Co) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an appeal against the trial judgment of the High Court in respect of an iron ore mining contract whereby the appellant's claim was dismissed with costs and the respondent's counterclaim of RM20,000 was allowed with costs.

[2] We heard the appeal on 19 January 2023 and thereafter unanimously allowed the appeal. In this regard, we found that the contract was terminated on 29 September 2016. We set aside the High Court's judgment and we, in substitution, only allowed the appellant's claim made in prayers (v), (vi) and (vii) of the statement of claim to be assessed by the High Court (but not exemplary and punitive damages) with costs of RM40,000 subject to allocatur. Additionally, the respondent's counterclaim is disallowed.

[3] The appellant and respondent were the plaintiff and defendant in the High Court respectively.

BACKGROUND

[4] By a quadripartite written agreement dated 26 February 2016 ('agreement') made between the respondent, appellant, Siva Kumar a/l Govindan (a director of the respondent) and Hoe Hock Lai (a director of the appellant), the respondent appointed the appellant as its exclusive mining subcontractor to mine an area known as ML 16/2014 Lot PA 26644 (PA 265864) Sungai Rawit, Mukim Semantan, Temerloh, Pahang consisting of 40.33 hectares (99.66 acres) ('land') upon which the Director of land & Mines of Pahang leased the land to Bayu Mining Sdn Bhd ('lessee'). The lessee and the respondent were also granted permission and rights as an operator to carry out development work and mining operation on the land by the Director of Land & Mines of Pahang.

[5] The agreement without its appendices is reproduced below:

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ORIGINAL

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AGREEMENT

THIS AGREEMENT is made on the day of 26 FEB 2016 , 2015

BETWEEN

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GEONEX (M) SDN. BHD. (COMPANY NO: 965183-H), a company incorporated under Companies Act 1965 with its business and registered address respectively at A35, 1st Floor, Jalan Tun Ismail Satu, 25100 Kuantan, Pahang and B-172, 2nd Floor, Jalan Dato' Lim Hoe Lek, 25200 Kuantan, Pahang (hereinafter referred to as the "GSB") of the one part;

AND

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VENTURE SKL SDN.BHD. (COMPANY NO: 1162498-W) a company incorporated under Companies Act 1965 with its business address at No.19, Lorong Galing 84, Jalan Air Putih, 25300 Kuantan, Pahang (hereinafter referred to as the "VSKL") of the second part;

AND

SIVA KUMAR A/L GOVINDAN (NRIC NO: 700308-06-5239) of No. 22, Jalan Sepatir, Taman Rimba, 28400 Mentakab, Pahang (hereinafter referred to as the "GSB's Director") of the third part;

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AND

HOE HOCK LAI (NRIC NO: 800607-11-5679) of No. 19, Lorong Galing 84, Jalan Air Putih, 25300 Kuantan, Pahang (hereinafter referred to as the "VSKL Director") of the fourth part.

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WHEREAS:-

1. GSB is a company carrying out the business conducting, amongst other, the business of mining operator which include and not limited to processing and other things related to mining of iron ore (hereinafter referred to as the "Mineral Iron Ore") and any other precious metals products and also the processing plant for the metal products particularly iron.

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GSB has represented to VSKL that they have been appointed by the Lessee (defined below) as the exclusive single operator with the rights/permit to mine a piece of

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mining land held under ML.16/2014 Lot/P.A. 26644 (PA 265864) Sungai Rawit, Mukim Semantan, Daerah Temerloh, Pahang (hereinafter referred to as the said 'Mining Land") measuring 40.33 hectares (99.66 acres) which was issued with mining lease (hereinafter referred to as the said 'Mining Lease") [a copy of the Mining Lease is produced in Appendix A] on 9.6.2014 for a period of two (2) years expiring on 8.6.2016 by the Director Of Land & Mines of Pahang to **BAYU MINING SDN.BHD. (COMPANY NO: 921300-H)** (hereinafter referred to as the said 'Lessee") having its business and registered address respectively at No.213, Jalan Masjid, Kampung Luit, 26500 Maran, Pahang and No.15, Tingkat 1, Bangunan Tabung Haji, Jalan Penjara, 25000 Kuantan, Pahang. The Lessee and GSB have, respectively, been granted the permission and rights as an operator to carry out the development work and mining operation on the Mining Land pursuant to issuance of the operational mining scheme (hereinafter referred to as the said "OMS") by the Director Of Land & Mines of Pahang & Director of Mines of Pahang vide OMS No: JMG.PHG.(M) 45/2014/14/(Fe) under the Act (defined below) from the period of 29.8.2014 until 31.08.2015 – which has since expired [a copy of the OMS is produced in Appendix B]. GSB has caused the Lessee and the Lessee has since apply for the renewal of the OMS pursuant to their application to the Director of Mines of Pahang [a copy of the application is produced in Appendix C] .

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3. GSB also represented to VSKL that the Mining Land has an estimation of 13 years deposit of Mineral Iron Ore (subject however to the operating estimation of 50,000 metric ton) with the grading of the Mineral Iron Ore having a minimum of 60% pure iron & ferro, after processing, based on the geologist report done by Konsultan Jurutera Melombong Yeow Sdn.Bhd. (Company No: 1026984-V) dated 25.6.2014 (a copy of the geologist report was given by GSB to VSKL).

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4. GSB further represented to VSKL that notwithstanding the Mining Lease being only for 2 years, GSB warrant and guarantee VSKL that GSB will ensure and cause the Lessee, in any way whatsoever, to continue applying for the renewal of the Mining Lease based on the economic life of the Mining Land and the mining operation pursuant to the Pahang Mineral Enactment 2001 (hereinafter referred to as the said 'Enactment") and Mineral Development Act 1994 (hereinafter referred to as the said 'Act") and that VSKL shall continuosly be appointed as the sole and exclusive contractor to carry out the Services subject to the terms and conditions provided herein. GSB and the Lessee has prior to the entry of this Agreement apply for the renewal of the Mining Lease pursuant to their application to the Director of Mines of Pahang [a copy of the application is produced in Appendix D].

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4A. VSKL is a company specializing and technical know how in the following which shall include but not limited to mining operation, mining development, win and extraction of iron ore and turning or processing the iron ore into Iron Ore, Iron Ore Lump or Iron Ore Other Products (all as define below) [hereinafter collectively referred to as the "Services"] and has the manpower and equipments to carry out the Services.

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5. GSB is desirous of engaging VSKL as the sole exclusive contractor to carry out the Services for and on the Mining Land and VSKL is desirous of providing the Services to GSB provided that or conditional upon the Mining Lease being extended and application therefor was filed in accordance with the Enactment enabling VSKL to carry out the mining operation on the Mining Land, that the application for the extension of or fresh application for the OMS was filed in accordance with the Act and subjected to the other terms and conditions hereinafter appearing particularly Clause 1 below.

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6. GSB's Director requested VSKL to accept GSB's offer to carry out the Services on the Mining Land based on the warranty and representation by the latter, and in consideration of VSKL accepting GSB's appointment to carry out the Services, GSB's Director has agreed to indemnify VSKL of all losses and damages suffered by VSKL as a result of any breach of the terms and conditions of this Agreement by GSB.

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7. VSKL's Director requested GSB to offer VSKL to perform the Services on the Mining Land and in consideration of GSB offering VSKL the appointment to carry out the Services, VSKL's Director has agreed to indemnify GSB of all losses and damages suffered by GSB as a result of any breach of the terms and conditions of this Agreement by VSKL.

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WHEREBY IT IS HEREBY AGREED as follows:-

1. (i) In consideration of the Remuneration mentioned below in Clause 8 below, GSB hereby agree to appoint VSKL to be their sole and exclusive contractor to carry out the Services in the Mining Land for the Term as defined below in Clause 1 (iv) and VSKL hereby agree to accept the said appointment in consideration of the following: -

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(a) the Remuneration;

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(b) GSB's warranty and representation as stated in the Recitals of this Agreement;

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(c) VSKL's appointment for the Term as defined in Clause 1 (iv) below;

(d) the production of a letter from the Lessee addressed to VSKL consenting to VSKL's appointment as sub-contractor for GSB and undertaking to ensure that the interest of VSKL are taken care of by adhering to GSB's warranty and duties in accordance herewith (by way of an endorsement in the manner as produced in Appendix E);

(e) the indemnity provided by the GSB's Director;

(f) the indemnity provided by the VSKL's Director;

(g) GSB providing VSKL with all relevant documentary evidence as stated in Recitals 2 and 4 aforesaid that the Mining Lease are in the process of being extended and that the OMS would also be extended or issued afresh, both in favour of the Lessee, to VSKL's satisfaction;

(h) GSB delivery of all necessary application, forms, documents including but not limited to the GSB's Form 24, Form 49, Memorandum and Articles of Association and directors resolution approving the entry into this Agreement; and

(i) the production of all other document(s) as informed by VSKL to GSB as part of the fulfilment of this Clause.

(ii) Upon the fulfilment of Clause 1 (i) aforesaid to VSKL's satisfaction then on written notice by VSKL, GSB hereto agree to do and shall cause the Lessee to do the following:-

(a) to apply for the relevant authority for the permit to use explosion in the Mining Land;

(b) to ensure in any way whatsoever that the Mining Lease and OMS remains or being continuously granted to the Lessee as the lease owner and GSB as the operator of the OMS at the expense of the Lessee and GSB for the economic life of the Mining Land and mining operations;

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(c) to apply for the supply of the electricity and water supply to the Mining Land for the specific usage by VSKL upon being notified of the same at expenses to be discussed between the parties hereto (where applicable);

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(d) (if the access to the Mining Land are passing through third party land(s), to secure the consent, rights to use and/or pass and/or access and/or easement through the said land(s)from any third party landowner(s) at the expense to be discussed between GSB and VSKL; and

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(e) to assist the VSKL in any way whatsoever for the application of anything for the purpose of mining operation and development of the Mining Land including but not limited to working permits for VSKL's workers/staffs at the expense of VSKL.

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(iii) On the fulfillment of the terms as stated in Clauses 1(i) to (ii), VSKL are entitled to have and/or take absolute possession of the said Mining Land and shall be entitled to commence all activities to carry out the Services in the said Mining Land (hereinafter known as 'Effective Date') provided however that GSB shall grant VSKL an approximately sixty (60) days of weather working conditions (which shall exclude but not limited to rainy days) grace period of non mining operation and exclusion from complying with the Guarantee Processing (define below), to mobilise the production line or development work on the Mining Land. In the event that VSKL are still unable to fully mobilise the production line or development work on the Mining Land within the approximate time frame then VSKL shall be given/allowed further time to complete the mobilisation and if there are days of non working weather conditions then those number of days shall be added to the calculation of the said sixty (60) days.

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(iv) The parties hereto agree that the appointment of VSKL shall be for the economic life and mining operation of the Mining Land (hereinafter referred to as the "Term") from the date of this Agreement. Based on the warranty and representation of GSB, VSKL has put on standby all equipments and machineries for the mining operation and mining development of the Mining Land costing not less than Ringgit Malaysia One Million Five Hundred Thousand (RM1,500,000.00) but not more than approximately Ringgit Malaysia Two Million (RM2,000,000.00) only. A copy of the estimated listing

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of the equipments and machineries are produced in Appendix F with the final listing to be provided by VSKL to GSB upon the completion of the installation of the equipments and machineries on the Mining Land after the execution of this agreement and shall be deemed as supplemental to this Agreement.

(v) Notwithstanding anything stated to the contrary in this Clause 1 (iii) aforesaid, VSKL agree, at the request of GSB, to mobilise its equipments and machinery as stated in Clause 1(iv) aforesaid and carry out the development work and mining operation on the Mining Land prior to GSB's fulfillment of Clauses 1 (i) & (ii) aforesaid but such act shall not be deemed as waiving or prejudicing VSKL's rights and the requirement as stated in Clauses 1 (i) & (ii) aforesaid and in the event that GSB shall fail to fulfill Clauses 1(i) & (ii) within reasonable time frame then VSKL shall have the remedy and reliefs as provided in Clause 9 below. The time frame for mobilisation of the production line or development work on the Mining Land and exclusion from complying with the Guarantee Processing as stated in Clause 1 (iii) aforesaid shall be applicable in this Clause.

2. (i) In consideration of VSKL accepting GSB's offer to carry out the Services on the Mining Land based on the warranty and representation of the latter, the GSB's Director has agreed to indemnify VSKL against all losses and damages suffered by VSKL in full including legal cost and expenses (including the solicitors' fees) incurred as a result of any breach of the terms and conditions of this Agreement by GSB and further agree that, they are as liable to VSKL as if they are the principal debtor in this case.

(ii) VSKL's Director requested GSB to offer VSKL to perform the Services on the Mining Land and in consideration of GSB offering VSKL the appointment to carry out the Services, VSKL's Director has agreed to indemnify GSB of all losses and damages suffered by GSB in full including legal cost and expenses (including the solicitors' fees) incurred as a result of any breach of the terms and conditions of this Agreement by VSKL.

3. VSKL hereby covenant with GSB that the scope of the Services shall include the following:-

Existing Left Over Of Mineral Iron Ore on the site of the Mining Land

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(i) VSKL were made aware by GSB that currently the Mining Land has some leftover of the Mineral Iron Ore during previous mining operation done another third party. GSB has represented to VSKL that the third party has since ceased all operation and has no longer any interest over the Mining Land nor the leftover of the Mining Iron Ore. At GSB's request, VSKL have agreed to process the leftover of the Mineral Iron Ore into either Iron Ore Lump or Iron Ore Other Products (both as define in Clause 3 (iii) [hereinafter referred to as the "Processed Leftover Iron Ore"] provided that GSB shall first process the leftover Mineral Iron Ore into a block of 6" x 9" (hereinafter referred to as the "Leftover Iron Ore ") and handover/delivered the same to VSKL. Once VSKL have done their part provided under this Clause then VSKL shall pile up the same onto the stockyard on the Mining Land;

(ii) both parties agreed to the following:-

(a) GSB agree to pay VSKL the sum of United States Dollar Four (USD4.00) per metric ton for the processing of the Leftover Iron Ore to the Processed Leftover Iron Ore in the manner as provided in 3(i) aforesaid.

(b) VSKL shall assist GSB (who can also conduct the sales) in selling to the purchaser who would offer the highest price for the Processed Leftover Iron Ore provided however that the party [i.e. either VSKL or GSB] (hereinafter referred to as the "Selling Party") who intends to sell must inform the other party the amount offered by the purchaser. In the event the said other party is satisfied with the said price offered (hereinafter referred to as the "Selling Price") by the purchaser then the Selling Party shall proceed to transact and complete the sales. However, if the said other party has other purchaser with a higher offer then the Selling Party shall sell the Processed Leftover Iron Ore to the said purchaser;

(c) the sales of the Processed Left Over Iron Ore shall be made and concluded in either the name of VSKL or GSB and all payments in respect of the said sales shall be made payable either to VSKL or GSB and no others, depending or which party shall conclude the sales;

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(d) once the purchaser has paid up the payment for the sales of the Processed Leftover Iron Ore as provided in Clause 3(ii)(b) aforesaid then the said sum shall be deducted against all the cost involved from the processing operation (which include the United States Dollar Four (USD4.00) per metric ton stated in Clause 3 (ii)(a) aforesaid) up until the sales including but not limited to payment for premium and/or royalties payable to the relevant authority in respect of the Processed Leftover Iron Ore, permit to export the Processed Leftover Iron Ore, transportation cost, freights charges & etc.]; &

(e) once the payment of each sales is completed and have been deposited into either the account of VSKL or GSB then the party who concluded the sales shall pay the other party the balance of the Selling Price less all the cost and expenses as stated in Clause 3(ii)(d) above within the period of seven working (7) days from the deposit.

Mineral Iron Ore from the Mining Operation carry out by VSKL on the Mining Land

(iii) at the discretion of VSKL depending on the current market needs, mining and processing of the Mining Iron Ore rocks into a block of 6" x 9" (hereinafter referred to as the "Iron Ore Block") and/or into Iron ore lump from 0-50mm (hereinafter referred to as the "Iron Ore Lump") or into any other type of iron ore product or sizes (hereinafter referred to as the "Iron Ore Other Products") depending on the market demand and assist GSB in the sales of the Iron Ore Block or Iron Ore Lump or Iron Ore Other Products to any third party purchaser to be done in accordance with Clause 7 below;

(iv) shall abide by the rules and regulations as provided in the Mining Lease and OMS to mine the Mining Land subject however that the parties hereto are aware and agree that in the event that VSKL did not adhere to any of the rules and regulations as stipulated in Mining Lease and OMS then the parties hereto together with the Lessee shall work together and take all necessary and practicable action to rectify, ratify and take remedial steps to make right any non adherence of the rules and regulations. The parties hereto further agree that any non adherence to any one or more of the rules and regulations in the Mining Lease and OMS shall not be deemed nor termed as VSKL's default provided in Clause 4 (ii) below nor shall either party used it as a basis

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to terminate this Agreement.

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(v) at VSKL's own cost and expenses, provide adequate equipments or machineries and manpower for the purpose of the mining operation for Mineral Iron Ore in the Mining Land. VSKL shall provide and inform GSB details of any (a) new equipments or machineries or modification thereto that are brought onto the Mining Land & (b) existing or new workers or agents or employee engage by VSKL, to enable GSB to update, where necessary, the details with the relevant authority. The parties hereto agree that the failure and delay in VSKL providing the said details to GSB shall not be deemed nor termed as VSKL's default provided in Clause 4 (ii) below nor shall either party used it as a basis to terminate this Agreement;

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(vi) VSKL warrant the mining operation and processing of the Mineral Iron Ore to reach a minimum of 33,000 metric ton per calender month (hereinafter referred to as the "Guarantee Processing") subject however to Clause 3 (viii) and Clause 8 (i) below, to be free from all encumbrances liens charges and other liabilities, provided that the mining operation on the Mining Land shall only be for a period of maximum of ten (10) months per year, subject however that if any one or more of the following event happen within any one of the said ten (10) month then the parties agree to the following effect i.e. :-

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(a) when it is raining non-stop for a period of seven (7) consecutive days then both parties agree to deem that there shall not be any Guarantee Processing for that entire month;

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(b) breakdown of machinery for mining operation, inspection by the relevant authorities leading to an order to cease the mining operation (in which event the party shall adhere to Clause 3 (iv) aforesaid, acts of god, fires, strikes, lockouts or labour disputes, epidemics, wars, riots, earthquakes, storms, typhoons, floods and any other causes beyond the control of VSKL including but not limited to shortage or sudden hike in the cost of lorry or transportation etc., then the calculation of the Guarantee Processing shall be based proportionately on the number of days that the mining operation can be smoothly run/operational; and

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(c) military authority, wars, or the price for the sales of the Iron Ore Block or Iron Ore Lump or Iron Ore Other Products are below United States Dollar Forty (USD40.00) per metric ton based on the market rate ascertained on COST INSURANCE AND FREIGHT' (CIF), where both parties shall then call

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meeting (i) within ninety (90) days from the happening of the said events to discuss the same and the future and the viability of

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continuing with the mining operation. Either party shall have the option after the meeting(s) to decide that the mining operation shall be halted or ceased temporarily or permanently.

The parties hereto agree that the aforesaid list are not exhaustive and shall include any other acts or situation or happening leading to the cessation or interruption of the Services or failure to work on the Mining Land.

(vii) GSB have represented and shown/pin pointed to VSKL that there may be three (3) spots on the Mining Land having huge deposit of Mineral Iron Ore with one (1) particular spot measuring 100 metres in width x 200 metres in length x 40 metres in depth (hereinafter refered to as the "First Spot") . The parties hereto agree that VSKL shall concentrate their mining operation on the First Spot for the Mineral Iron Ore only until the deposit there are depleted before moving on to either one or both of the next two (2) spots subject however that the production for the Guarantee Processing may still be affected by Clauses 3 (vi) (a) to (c) aforesaid.

(viii). The calculation of the weight of the Mineral Iron Ore at the Mining Land whether prior to processing or after processing shall be based on the weight bridge reading at the site of the Mining Area to be installed at the cost upon discussion by both parties hereto.

4. (i) In the event that VSKL are unable to continue with the mining operation on the Mining Land due to the event(s) as provided in Clauses 3(vi)(b) or (c) or VSKL, at its discretion, decided that they are unable to continue with the mining operation on the Mining Land due to its non viability with or without any reason whatsoever then and in any one or more of such events, VSKL shall be entitled to, upon the service of the notice of termination of this Agreement, determine this Agreement whereupon GSB shall either pay VSKL the Remuneration that are due and owing to the VSKL (if any) or vice versa (if any), VSKL shall be allow to complete the processing of the remaining Mineral Iron Ore from mining operation into either Iron Ore Block, Iron Ore Lump or Iron Ore Other Products and proceed to sell the same and distribute the purchase price for the same in accordance to this Agreement, shall be allowed to remove their machineries, equipments and all other things belonging to VSKL from the Mining Land within the time frame and in accordance with Clause 5 below and thereafter the parties are hereby discharged from the duties under this Agreement which shall be null and void and of no further force or effect and neither party shall have any claim

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against the other in respect thereof save and except for any antecedent breach.

(ii) In the event that VSKL defaulted or breach the terms of this Agreement (other than those stated and excluded in Clause 3(iv) aforesaid) then and in any one or more of such events, GSB shall by notice in writing require VSKL to comply with the relevant terms and conditions within three (3) months from the date of notice from GSB. In the event that VSKL shall fail to comply then GSB shall be entitled to, upon the service of the notice of termination of this Agreement, determine this Agreement whereupon VSKL shall pay GSB the Remuneration that are due and owing to the GSB (if any) or vice versa (if any), VSKL shall be allow to complete the processing of the remaining Mineral Iron Ore from mining operation into either Iron Ore Block, Iron Ore Lump or Iron Ore Other Products and proceed to sell the same and distribute the purchase price for the same in accordance to this Agreemen, VSKL shall be allowed to remove their machineries, equipments and all other things belonging to VSKL from the Mining Land within the time frame and in accordance with Clause 5 below and thereafter the parties are hereby discharged from the duties under this Agreement which shall be null and void and of no further force or effect and neither party shall have any claim against the other in respect thereof save and except for any antecedent breach.

5. All machineries, equipments and other things deployed at the said Mining Land by VSKL for the purpose of extracting of the Mineral Iron Ore shall belong absolutely to VSKL and neither GSB nor the Lessee shall have no claims for whatsoever reasons in whatsoever situation against the said machineries and equipments and shall not take any court order or any writ of seizure and sale or injunction in order to seize or to stop the removal of VSKL equipments and machineries from the Mining Land. In the event that VSKL are required to move out together with all its equipments, machineries and good and belongings from the Mining Land for any reason whatsoever or as provided in this Agreement then the Lessee and GSB shall allow VSKL three (3) months to do so from the date of the final sales of the Iron Ore Block, Iron Ore Lump or Iron Ore Other Products herein or the date of termination, whichever shall be the later, (both as provided in Clauses 4 or 9) - without any compensation or damages being payable to the Lessee or the GSB for occupying the Mining Land for the said period.

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6. GSB hereby covenant with VSKL to do the following, knowing that the latter has on the basis of and in full reliance of all the information, representations and warranties provided by GSB as stated in this Agreement, which shall survive and continue to have full force and effect after this and any breaches hereof or rescission of this Agreement by the GSB or the Lessee . GSB hereby covenant and agree to indemnify and keep indemnified the VSKL or of its contractor or nominee against all or any losses, damages, claims and demands arising out of breach or breach of this Clause:-

(i) to perform as per Clause 1 (iv) aforesaid, secured the Mining Lease, any relevant permit, OMS, any other licences and any approval for the purpose of mining operation for the Mining Land and hand over the same to VSKL for the purpose of mining operation on the Mining Land. GSB shall secure the Lessee to make an application for extension of the Mining Lease and OMS strictly in accordance with the Enactment and the Act;

(ii) settle any toll charges payable from the Mining Land to go onto a third party's lands (which shall not include any federal roads or any roads provided for general use of the public) [if any and if applicable];

(iii) to indemnify and hold harmless the VSKL against all claims demands proceedings actions and prosecution arisen from the said mining operations from either the third party as referred to in Clause 3 (i) aforesaid or the relevant authority or from any other third party's claims, demands, writs, summonses and actions proceedings judgments order decrees damages costs losses and expenses of any nature whatsoever which VSKL may suffer or incur in connection with or arising out of the mining operation on the Mining Land through no fault of VSKL;

(iv) GSB shall ensure and cause the Lessee to ensure that the Lessee shall not sell, dispose any of or create any charge or in favour of any financial institution or assign the Mining Lease to any third party while this Agreement is still valid;

(v) the statements contained in the recitals hereto are true and correct and form the basis of this Agreement;

(vi) that the Lessee are the registered proprietor of the Mining Lease which at the time of entry into this Agreement are free from all encumbrances, liens, charges, trust, interest, claims, caveats, orders and proceedings and shall maintain the status throughout the substance of this Agreement;

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(vii) that GSB and the Lessee has not committed and are not in breach of any laws of Malaysia while carrying out the mining operation prior to this Agreement that may jeopardize VSKL covenant and commitment under this Agreement; and

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(viii) that the Lessee and GSB is not in default under any agreement to which he is a party and no litigation, arbitration, or administrative proceedings are presently current, or pending, or threatened and which default, litigation, arbitration or administration proceedings (as the case may be) might materially affect the financial condition of the the Lessee and GSB or might affect the Mining Lease and OMS.

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7. The parties hereto covenants with each other as follows:-

(i) that upon VSKL producing Iron Ore Block or Iron Ore Lump or Iron Ore Other Products, VSKL shall assist GSB (who can also conduct the sales) in selling the same to the purchaser who would offer the highest price for the Iron Ore Block or Iron Ore Lump or Iron Ore Other Products provided however that the party [i.e. either VSKL or GSB] (hereinafter referred to as the "Selling Party") who intends to sell must inform the other party the amount offered by the purchaser. In the event the said other party is satisfied with the said price offered (hereinafter referred to as the "Selling Price") by the Purchaser then the Selling Party shall proceed to transact and complete the sales. However, if the said other party has other purchaser with a higher offer then the Selling Party shall sell the Iron Ore Lump or Iron Ore Other Products to the said purchaser;

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(ii) the sales of the Iron Ore Block or Iron Ore Lump or Iron Ore Other Products shall be made and concluded in the name of VSKL and all payments in respect of the said sales shall be made payable to VSKL and no others;

F

(iii) once the production of the Iron Ore Block or Iron Ore Lump or Iron Ore Other Products has reached the weight of 33,000 metric tonnage (subject however to Clause 8 (i) below) and if the market price therefor are volatile and are below United States Dollar Forty (USD40.00) per metric ton then VSKL shall meet with GSB in the manner provided in Clause 3 (vi) (c) aforesaid then VSKL has the rights to halt the production of mining operation and the processing of the Iron Ore Block or Iron Ore Lump or Iron Ore Other Products and may resume the production thereof, in accordance with this Agreement, upon the disposal of 30,000 metric tonnage from the said 33,000 metric tonnage (in the manner provided in Clauses 8 and 8(i) below) to any third party purchaser. The parties hereto covenant and agree that the current world market pricing on Iron ore or Iron Ore Block or Iron Ore Lump or Iron Ore Other

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Products are volatile and currently at its lowest. In such an event the parties agree are that if the pricing of the iron ore, Iron Ore Block or Iron Ore Lump or Iron Ore Other Products are on the high side and above the said United States Dollar Forty (USD40.00) per metric ton then the mining operation of the Mineral Iron Ore shall not be halted by VSKL but to be continuously operational;

(iv) that the Services and the processing of the Mineral Iron Ore and all disputes or problems arising between the parties hereto or arising from the Mining Operations shall be discussed amongst the parties regularly when the need arises and only after this discussion shall the parties hereto proceed to exercise their respective rights provided under this Agreement provided in Clauses 4 and 9 herein;

(v). that at all times during the subsistence of this Agreement ensure their business and Services affairs are conducted in a diligent and proper manner;

(vi). it is impractical to make provision for every contingency that may arise in the course of the observance or performance thereof. Accordingly, the parties declare it to be a cardinal principle of this Agreement that they will at all times use their best endeavours to further the output of the Iron Ore Block or Iron Ore Lump or Iron Ore Other Products and that they shall not act in a manner prejudicial thereto;

(vii). declare it to be a cardinal principle of this Agreement that it shall operate between them in fairness and without detriment to the interests of any of them and if in the course of the performance of this Agreement unfairness to a party is disclosed or anticipated then the parties shall use their best endeavours to agree upon such action as may be necessary and equitable to remove the cause or causes of the same;

(viii). that the parties hereto reiterate their commitment as provided in the situation provided in Clause 3 (iv) aforesaid;

(ix) both parties shall deliver all their respective Forms 24, Form 49, Memorandum and Articles of Association and directors resolution approving the entry into this Agreement.

8. The parties have agreed that the parties remuneration under this Agreement shall be that of profit sharing basis in the following manner ("hereinafter referred to as the "Remuneration") except as provided otherwise below:-

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(i) the parties hereto agree that in the event that VSKL has managed to secure the processing of the Mineral Iron Ore up to 33,000 metric ton then VSKL shall be entitled to 3,000 metric ton of the Mineral Iron Ore as bonus for achieving the high mining operation to be dealt with at the discretion of VSKL and this practice shall continue throughout the Term. In such an event the Final Price of Minerals as defined below when distributed as per Clause 8(iii) shall be based on and for 30,000 metric ton instead of 33,000 metric ton. Whereas the distribution, as per Clause 8 (iii) below, based on and for the 3,000 metric ton shall be the net price (hereinafter known as 'Final Price Of Bonus Minerals") after the deduction of all cost and expenses as provided in Clause 8 (ii) below (except RM33.00 per metric ton to GSB for its payment of its expenses where this amount shall not be deducted as cost and expenses and shall be ignored);

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(ii) once the Purchaser has paid up the payment for the sales of the Iron Ore Block or Iron Ore Lump or Iron Ore Other Products as provided in Clause 7 (i) aforesaid then the said sum shall be deducted against all the cost involved from the mining operation up until the sales including but not limited to payment of Ringgit Malaysia Thirty Three (RM33.00) per metric ton to GSB for payment of its expenses, for premium and/or royalties payable to the relevant authority in respect of the Iron Ore Block or Iron Ore Lump or Iron Ore Other Products which amounts to approximately Ringgit Malaysia One Hundred Sixty Eight (RM168.00) per metric ton [excluding however but not limited to the following cost which shall vary from time to time i.e. permit to export the Iron Ore Block or Iron Ore Lump or Iron Ore Other Products, transportation cost, freights charges and to be added to the RM168.00 upon ascertainment thereof] to get the net price for therefor (hereinafter known as 'Final Price Of Minerals");

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(iii) upon the ascertainment of the Final Price of the Minerals and Final Price of Bonus Minerals, GSB shall be paid thirty percent (30%) of the Final Price of the Minerals and Final Price of Bonus Minerals (hereinafter known as "GSB Remuneration") whereas the balance value of seventy percent (70%) shall belong to the VSKL (hereinafter known as "VSKL Remuneration") both to be based on 30,000 metric ton and 3,000 metric ton, respectively as provided in Clause 8 (i) aforesaid;

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(iv) the payment for the sales aforesaid shall be completed and have been deposited into the account of VSKL then VSKL shall pay GSB its respective share of the

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Final Price of Minerals based on GSB Remuneration within the period of seven working (7) days from the deposit.

9. In the event that GSB shall:-

(i) be unable to and shall be unable to cause the Lessee to secure the extension of the Mining Lease and the OMS upon VSKL acting in accordance with Clause 1 (v) aforesaid within a reasonable period;

(ii) determine or breach any terms and conditions of this agreement; or

(iii) transfer, assign the Mining Lease and/or the OMS without the written consent of VSKL; or

(iv) act in any way to deprive VSKL from enjoying the benefit of this Agreement; or

(v) be terminated by the Lessee for any reason whatsoever, regardless of whether the termination are valid or invalid in law;

(vi) discovered that the Mining Lease and/or the OMS have been terminated or suspended by the relevant authority for any reason whatsoever, regardless of whether the termination are valid or invalid in law, which shall be informed by GSB to VSKL;

(vii) discovered that the Lessee requested for the termination of the Mining Lease and/or the OMS or acted in such a way to deprive GSB or VSKL from enjoying the benefit of this Agreement, which shall be informed by GSB to VSKL;

then and in any one or more of such events VSKL shall be entitled take legal action for all or any one or more of the following reliefs against GSB, GSB Director and/or any other persons, personally or jointly and severally:

(a) to prohibit any such mining operations on the Mining Land pending resolution of the legal action;

(b) to restrain such transfer and/or assignment of the Mining Lease and/or OMS;

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(c) to suspend the OMS relating to the said Mining Land;

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(d) specific performance of the Lessee's and/or GSB obligations herein contained or any other relief under the law; and

(e) damages.

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10. All annual rents assessments and/or other outgoings in respect of the said Mining Land shall be borne and paid for by the GSB for the issue of the Mining Lease and OMS for the said Mining Land.

11. All costs and expenses incidental to this Agreement including stamp duty shall be paid by VSKL except for the solicitors' cost where each party shall bear their respective cost in respect thereof.

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12. Time wherever mentioned shall be the essence of this Agreement.

13. Unless otherwise provided for any notice required to be served pursuant to this Agreement by either party hereto to the other shall be in writing and may be delivered or sent by registered post to the last known address of the party to whom such notice is sent and notice so sent by registered post shall be deemed to have be delivered and served at the expiration of the seven (7) days from the date of the letter regardless of the notice being return to the sender.

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14. This Agreement shall be binding upon the heirs, personal representative's successors in title and permitted assigns of the parties hereto.

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15. Any delay, indulgence, forbearance or time given by either party to the other shall not constitute or be deemed to be a waiver of any rights accruing or due to the first party or prejudice the first party's rights and remedies at law or herein contained.

16. This Agreement shall be governed by the laws of Malaysia and the parties hereby agree to submit themselves to the jurisdiction of the Courts of Malaysia at Kuantan, Pahang. The Recital shall be construed as part of this Agreement.

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17. This Agreement and all rights and obligations hereunder are personal to the parties hereto and neither party shall assign nor attempt to assign any such rights or obligations to any party without the prior written consent of the other party.

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18. This Agreement constitutes the whole agreement between the parties hereto and it is expressly declare that no variations shall be effective unless made by the parties hereto in writing. This Agreement constitutes the whole agreement between the parties hereto and supersedes all prior discussions, conflicts, inconsistency and writings between the parties herein and it is expressly declare that no variations shall be effective unless made by the parties hereto in writing.

19. Nothing in this Agreement shall be deemed to create a partnership between the parties hereto or to make on party the representatives or agent of the other party or parties and no party shall so hold itself out, nor shall any party be liable or bound by any act or omission of the other party or parties.

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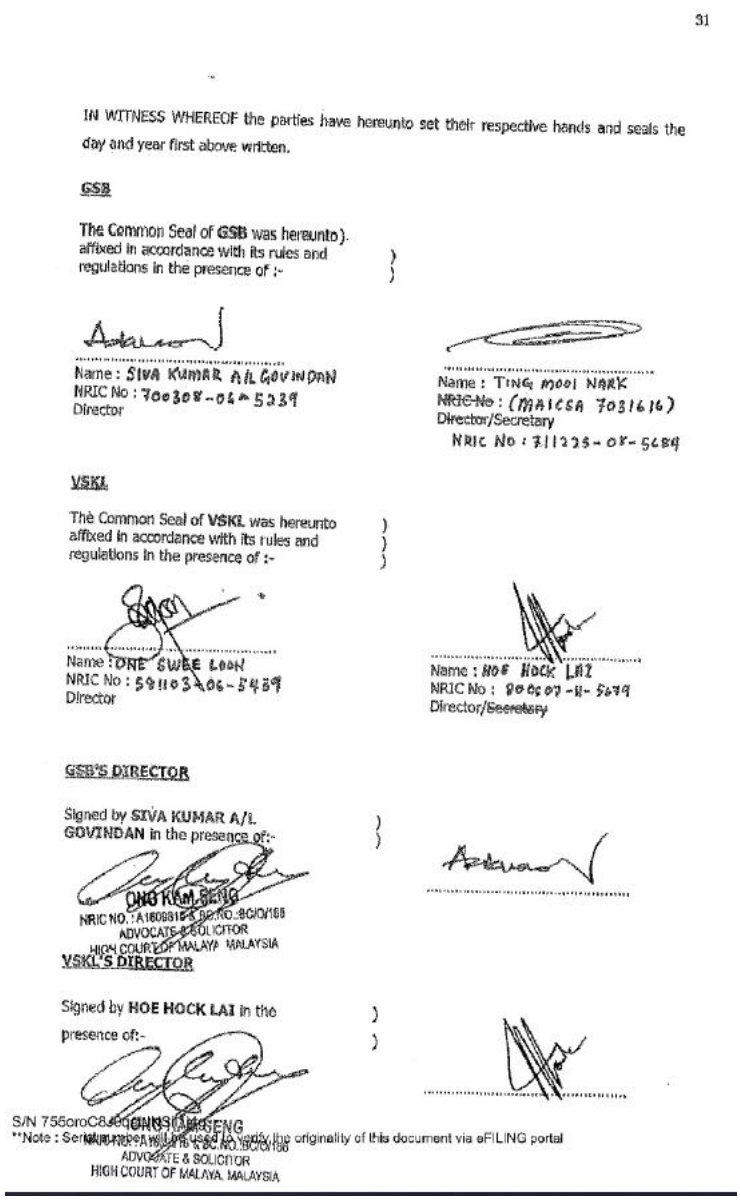

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IN WITNESS WHEREOF the parties have hereunto set their respective hands and seals the day and year first above written.

B

GSB

The Common Seal of **GSB** was hereunto affixed in accordance with its rules and regulations in the presence of :-

C

Name : SIVA KUMAR A/L GOVINDAN
NRIC No : 700308-04-5239
Director

Name : TING MOOI NARK
NRIC No : (MAICSA 7031616)
Director/Secretary
NRIC No : 711225-08-5489

D

VSKL

The Common Seal of **VSKL** was hereunto affixed in accordance with its rules and regulations in the presence of :-

E

Name : ONE SWEE LOON
NRIC No : 591103-06-5459
Director

Name : HOE HOCK LAI
NRIC No : 800507-11-5479
Director/Secretary

GSB'S DIRECTOR

F

Signed by **SIVA KUMAR A/L GOVINDAN** in the presence of:-

ONG KIM SENG
NRIC NO. : A1609815 B/C NO. : BC/0198
ADVOCATE & SOLICITOR
HIGH COURT OF MALAYA MALAYSIA

G

VSKL'S DIRECTOR

Signed by **HOE HOCK LAI** in the presence of:-

ONG KIM SENG
NRIC NO. : A1609815 B/C NO. : BC/0198
ADVOCATE & SOLICITOR
HIGH COURT OF MALAYA MALAYSIA

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S/N 755oroC8 **ONG KIM SENG**
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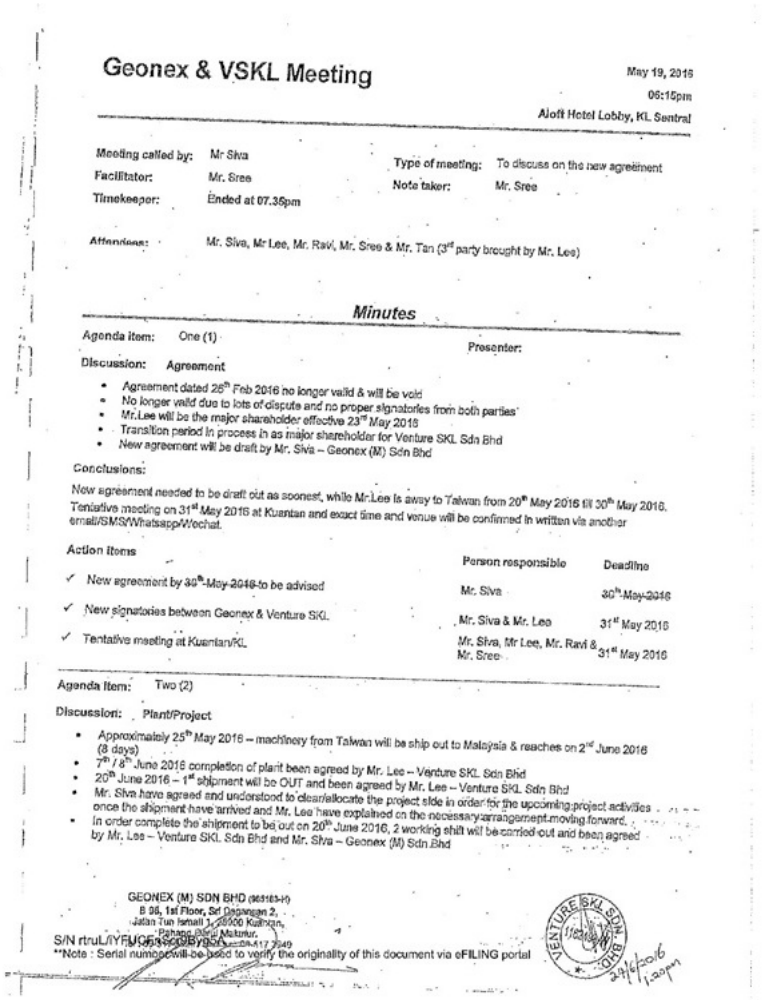
I **[6]** After the execution of the agreement, the appellant's and respondent's representatives met on 19 May 2016 and 31 May 2016 and discussed on the agreement ('meetings'). The minutes of the meetings are also reproduced below:



Geonex & VSKL Meeting

May 19, 2016
06:15pm
Aloft Hotel Lobby, KL Sentral

Meeting called by: Mr Siva
Facilitator: Mr. Sree
Timekeeper: Ended at 07.35pm
Type of meeting: To discuss on the new agreement
Note taker: Mr. Sree

Attendees: Mr. Siva, Mr Lee, Mr. Ravi, Mr. Sree & Mr. Tan (3rd party brought by Mr. Lee)

Minutes

Agenda item: One (1)
Presenter:

Discussion: Agreement

- Agreement dated 26th Feb 2016 no longer valid & will be void
- No longer valid due to lots of dispute and no proper signatories from both parties
- Mr.Lee will be the major shareholder effective 23rd May 2016
- Transition period in process in as major shareholder for Venture SKL Sdn Bhd
- New agreement will be draft by Mr. Siva – Geonex (M) Sdn Bhd

Conclusions:

New agreement needed to be draft out as soonest, while Mr.Lee is away to Taiwan from 20th May 2016 till 30th May 2016.
Tentative meeting on 31st May 2016 at Kuantan and exact time and venue will be confirmed in written via another email/SMS/Whatsapp/Wechat.

Action items	Person responsible	Deadline
✓ New agreement by ~~30th May 2016~~ to be advised	Mr. Siva	~~30th May 2016~~
✓ New signatories between Geonex & Venture SKL	Mr. Siva & Mr. Lee	31st May 2016
✓ Tentative meeting at Kuantan/KL	Mr. Siva, Mr Lee, Mr. Ravi & Mr. Sree	31st May 2016

Agenda item: Two (2)

Discussion: Plant/Project

- Approximately 25th May 2016 – machinery from Taiwan will be ship out to Malaysia & reaches on 2nd June 2016 (8 days)
- 7th / 8th June 2016 completion of plant been agreed by Mr. Lee – Venture SKL Sdn Bhd
- 20th June 2016 – 1st shipment will be OUT and been agreed by Mr. Lee – Venture SKL Sdn Bhd
- Mr. Siva have agreed and understood to clear/allocate the project side in order for the upcoming project activities once the shipment have arrived and Mr. Lee have explained on the necessary arrangement moving forward.
- In order complete the shipment to be out on 20th June 2016, 2 working shift will be carried out and been agreed by Mr. Lee – Venture SKL Sdn Bhd and Mr. Siva – Geonex (M) Sdn Bhd

GEONEX (M) SDN BHD (963163-H)
B 35, 1st Floor, Sri Dagangan 2,
Jalan Tun Ismail 1, 25000 Kuantan,
Pahang (Darul Makmur).
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VENTURE SKL SDN BHD
24/6/2016
1.30pm

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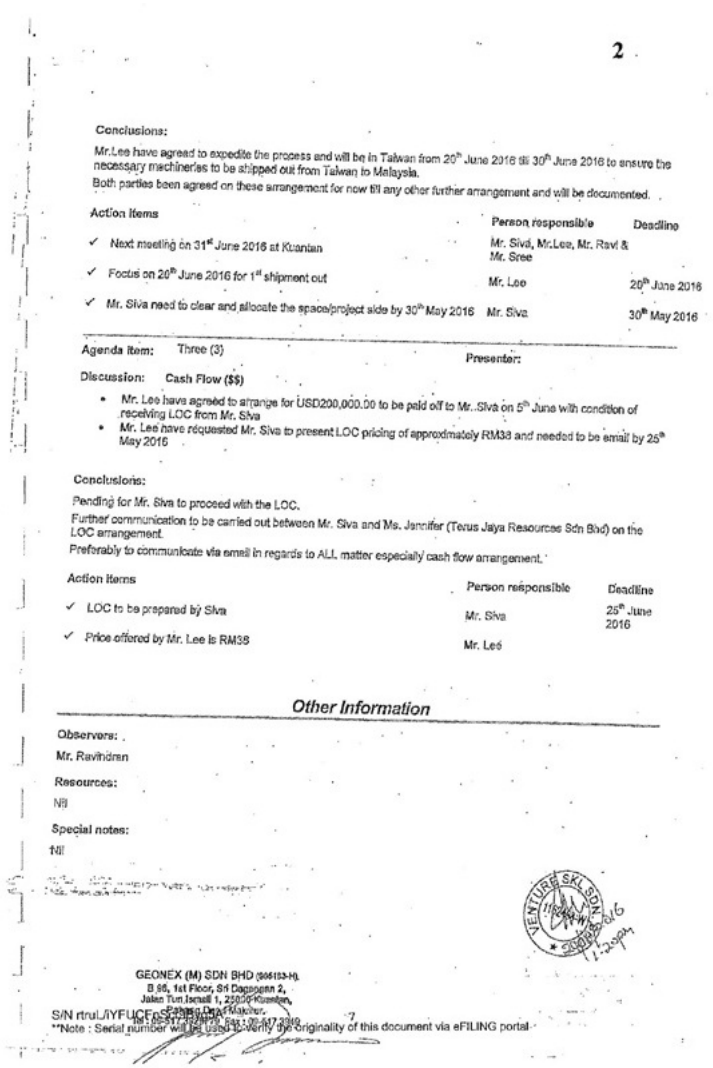

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Conclusions:

Mr.Lee have agreed to expedite the process and will be in Taiwan from 20th June 2016 till 30th June 2016 to ensure the necessary machineries to be shipped out from Taiwan to Malaysia.
Both parties been agreed on these arrangement for now till any other further arrangement and will be documented.

Action Items	Person responsible	Deadline
✓ Next meeting on 31st June 2016 at Kuantan	Mr. Siva, Mr.Lee, Mr. Ravi & Mr. Sree	
✓ Focus on 20th June 2016 for 1st shipment out	Mr. Lee	20th June 2016
✓ Mr. Siva need to clear and allocate the space/project side by 30th May 2016	Mr. Siva	30th May 2016

Agenda Item: Three (3) **Presenter:**

Discussion: **Cash Flow ($$)**

- Mr. Lee have agreed to arrange for USD200,000.00 to be paid off to Mr..Siva on 5th June with condition of receiving LOC from Mr. Siva
- Mr. Lee have requested Mr. Siva to present LOC pricing of approximately RM38 and needed to be email by 25th May 2016

Conclusions:

Pending for Mr. Siva to proceed with the LOC.
Further communication to be carried out between Mr. Siva and Ms. Jennifer (Terus Jaya Resources Sdn Bhd) on the LOC arrangement.
Preferably to communicate via email in regards to ALL matter especially cash flow arrangement.

Action Items	Person responsible	Deadline
✓ LOC to be prepared by Siva	Mr. Siva	25th June 2016
✓ Price offered by Mr. Lee is RM38	Mr. Lee	

Other Information

Observers:
Mr. Ravindran

Resources:
Nil

Special notes:
Nil

VENTURE SKL SDN BHD

GEONEX (M) SDN BHD (505153-H)
B 98, 1st Floor, Sri Dagangan 2,
Jalan Tun Ismail 1, 25000 Kuantan,
Pahang Darul Makmur.
Tel : 09-517 4747 Fax : 09-517 4749

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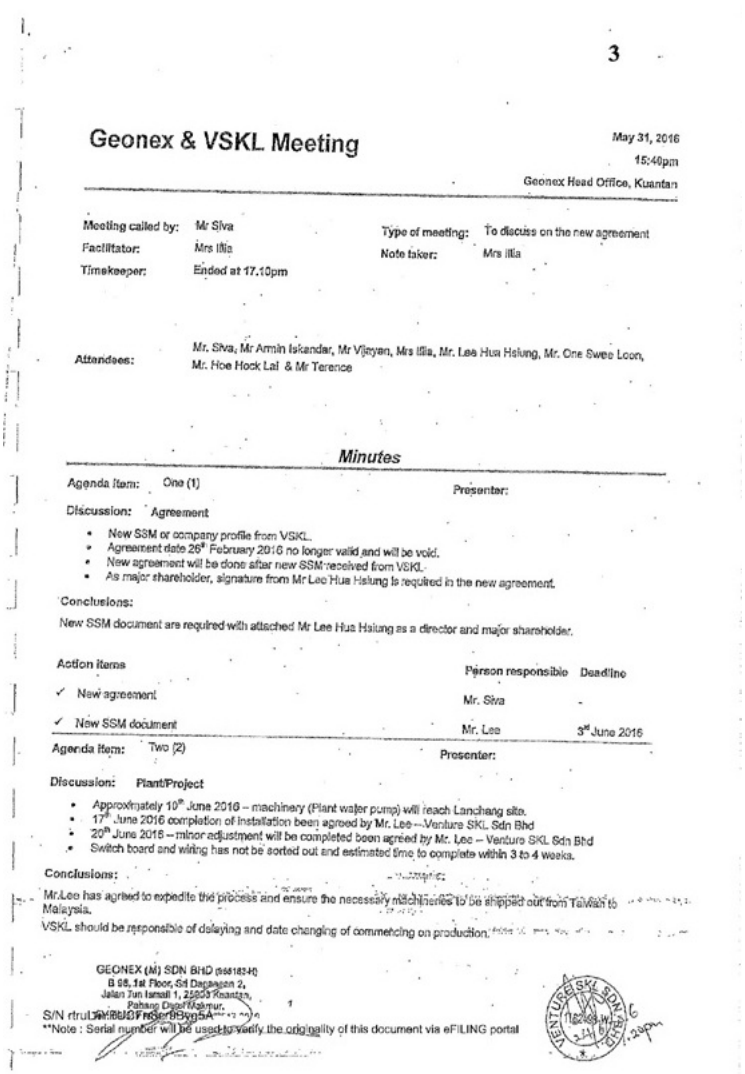

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Geonex & VSKL Meeting

May 31, 2016
15:40pm
Geonex Head Office, Kuantan

Meeting called by:	Mr Siva	Type of meeting:	To discuss on the new agreement
Facilitator:	Mrs Illia	Note taker:	Mrs Illia
Timekeeper:	Ended at 17.10pm		

Attendees: Mr. Siva, Mr Amin Iskandar, Mr Vijayan, Mrs Illia, Mr. Lee Hua Hslung, Mr. One Swee Loon, Mr. Hoe Hock Lai & Mr Terence

Minutes

Agenda Item: One (1) Presenter:

Discussion: Agreement

- New SSM or company profile from VSKL.
- Agreement date 26th February 2016 no longer valid and will be void.
- New agreement will be done after new SSM received from VSKL.
- As major shareholder, signature from Mr Lee Hua Hslung is required in the new agreement.

Conclusions:

New SSM document are required with attached Mr Lee Hua Hslung as a director and major shareholder.

Action items	Person responsible	Deadline
✓ New agreement	Mr. Siva	-
✓ New SSM document	Mr. Lee	3rd June 2016

Agenda Item: Two (2) Presenter:

Discussion: Plant/Project

- Approximately 10th June 2016 – machinery (Plant water pump) will reach Lanchang site.
- 17th June 2016 completion of installation been agreed by Mr. Lee – Venture SKL Sdn Bhd
- 20th June 2016 – minor adjustment will be completed been agreed by Mr. Lee – Venture SKL Sdn Bhd
- Switch board and wiring has not be sorted out and estimated time to complete within 3 to 4 weeks.

Conclusions:

Mr.Lee has agreed to expedite the process and ensure the necessary machineries to be shipped out from Taiwan to Malaysia.

VSKL should be responsible of delaying and date changing of commencing on production.

GEONEX (M) SDN BHD (668182-H)
B 68, 1st Floor, Sri Dagangan 2,
Jalan Tun Ismail 1, 25000 Kuantan,
Pahang Darul Makmur.

S/N rtrul:AmIsk01 nqcr:B5ygbA**
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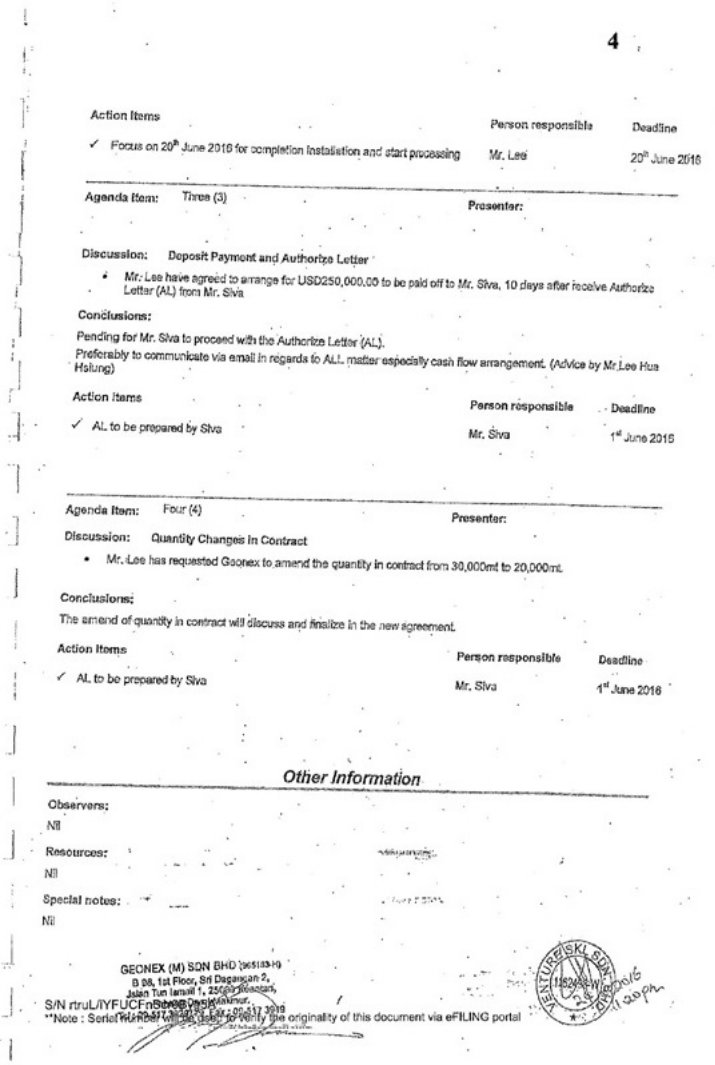
VENTURE SKL SDN BHD

A



4

Action Items | Person responsible | Deadline

✓ Focus on 20th June 2016 for completion installation and start processing | Mr. Lee | 20th June 2016

Agenda Item: Three (3) Presenter:

Discussion: Deposit Payment and Authorize Letter

- Mr. Lee have agreed to arrange for USD250,000.00 to be paid off to Mr. Siva, 10 days after receive Authorize Letter (AL) from Mr. Siva

Conclusions:

Pending for Mr. Siva to proceed with the Authorize Letter (AL).

Preferably to communicate via email in regards to AL. matter especially cash flow arrangement. (Advice by Mr Lee Hua Hslung)

Action Items | Person responsible | Deadline

✓ AL to be prepared by Siva | Mr. Siva | 1st June 2016

Agenda Item: Four (4) Presenter:

Discussion: Quantity Changes in Contract

- Mr. Lee has requested Geonex to amend the quantity in contract from 30,000mt to 20,000mt.

Conclusions:

The amend of quantity in contract will discuss and finalize in the new agreement.

Action Items | Person responsible | Deadline

✓ AL to be prepared by Siva | Mr. Siva | 1st June 2016

Other Information

Observers:

Nil

Resources:

Nil

Special notes:

Nil

GEONEX (M) SDN BHD

S/N rtruL/IYFUCFn

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B

C

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[7] Since the conclusion of the aforementioned meetings, there was no new agreement entered between the parties.

I

[8] As a result, the respondent via its solicitor Messrs Bastion Vendargon wrote on 2 September 2016 and again on 7 September 2016 to the appellant enquiring about the drafting of the new agreement.

[9] The respondent thereafter on 29 September 2016 wrote to the appellant

to forthwith cease all operations until the new agreement is finalised and executed by the parties. A

[10] The respondent again via its solicitor Messrs Bastion Vendargon wrote on 17 October 2016 to the appellant giving the appellant two weeks from the date of the notice to vacate the land. B

[11] The appellant via its solicitor Messrs R Shan & Associates replied on 27 October 2016 to the respondent's solicitor Messrs Bastion Vendargon that the agreement was still valid and on the appellant's desire to continue to perform the agreement. The appellant also denied trespassing on the land. C

[12] Subsequently after the mining lease had been successfully renewed, the respondent via its solicitor Messrs Bastion Vendargon wrote on 29 November 2017 to the appellant giving the appellant four weeks from the date of the notice to vacate the land. D

[13] The appellant via its new solicitor Messrs Andrew-David Wong & Ong replied on 20 December 2017 to the respondent' solicitor Messrs Bastion Vendargon that the agreement was still valid but the appellant could not carry out mining activity since October 2016 because of the dispute between the respondent and the lessee on mining on the land. The appellant maintained that it was ready and willing to perform the agreement and did not wish to vacate the land. E F

[14] As a result, the respondent via its solicitor Messrs Bastion Vendargon replied on 28 December 2017 to the appellant's solicitor Messrs Andrew-David Wong & Ong that there was no valid agreement and the appellant was unable to perform and had abandoned its mining activity on the land. G

[15] The appellant via its solicitor Messrs Andrew-David Wong & Ong thereafter wrote on 13 March 2018 to the respondent's solicitor Messrs Bastion Vendargon that the respondent had wrongly dismantled and removed the appellants plant and machineries on the land and wish to re-enter the site to dismantle and remove the balance of its plant and machineries in mitigation of loss on a without prejudice basis. H

[16] However, the respondent via its solicitor Messrs Bastion Vendargon replied on 15 March 2018 to the appellant's solicitor Messrs Andrew-David Wong & Ong that the respondent rejected the appellant's request and the respondent would continue to remove and dispose whatever obstructive materials left on the land. I

[17] Finally, the appellant on 27 March 2018 instituted its action in the High Court and claimed the following in para (10) of its statement of claim:

(i) Defendan sendiri, ejen-ejen, atau pengkhidmat-pengkhidmat beliau selainnya ditahan dan suatu Injunksi dikeluarkan untuk menahan dan melarang mereka ini melakukan kerja-kerja meleraikan dan mengeluarkan kilang — 'processing plant' dan semua harta benda kepunyaan Plaintif di kawasan konsesi tapak perlombongan yang di kenali sebagai ML. 16/2014 LOT PA 26644 (PA265864) Sungai Rawit, Mukim Semantan, Daerah Temerloh, Pahang Darul Makmur;

(ii) Plaintif dibenarkan untuk menanggalkan dan mengeluarkan dalam masa yang munasabah kilang — 'processing plant' dan semua harta benda kepunyaan Plaintif tanpa sebarang sekatan, gangguan mahupun larangan daripada Defendan sendiri, ejen-ejen atau pengkhidmat-pengkhidmat beliau sendiri di kawasan konsesi tapak perlombongan yang di kenali sebagai ML. 16/2014 LOT PA 26644 (PA265864) Sungai Rawit, Mukim Semantan, Daerah Temerloh, Pahang Darul Makmur;

(iii) Suatu Deklarasi bahawa Perjanjian bertarikh 26/02/2016 adalah sah dan berkuatkuasa;

(iv) Pembatalan Perjanjian bertarikh 26/02/2016 oleh pihak Defendan adalah tidak sah;

(v) Dalam alternatif, Defendan membayar Plaintif gantirugi dan kerugian atas kilang — 'processing plant' yang telah dileraikan dan dikeluarkan oleh Defendan sendiri, ejen-ejen atau pengkhidmat-pengkhidmatnya tanpa kebenaran dan keizinan Plaintif-Plaintif;

(vi)(a) Gantirugi Khas;

(b) Gantirugi Am; dan

(c) Gantirugi Ekonomi, kesemuanya ditaksirkan oleh Mahkamah yang Mulia ini;

(vii) Faedah 5% setahun dari tarikh penamatan perjanjian Penamatan pada 29/09/2016;

(viii) Plaintif diberikan keizinan dan kebebasan untuk mebuat permohonan dan relif-relif lain sampingan selanjutnya;

(ix) Perintah yang selanjutnya dan lain-lain relif yang Mahkamah sifatkan sesuai dan berpatutan.

[18] The respondent counterclaimed the following:

(1) damages for the storage of the machinery or equipment and/or plant and their obstruction and interference with the defendant's mining activity to be assessed and paid to the defendant;

(2) interest thereon from the date of judgment till full realisation;

(3) damages for inducement of breach of contract to be assessed and paid by the defendant;

(4) interest thereon from the date of judgment till full realisation at the rate prescribed on (3) above;

(5) costs to be paid by the plaintiff to the defendant; and

(6) such further or other relief.

IN THE HIGH COURT

[19] After trial, the learned High Court judge basically found the appellant failed to discharge its burden of proof that the agreement was still valid and enforceable because it is the appellant's duty to either adduce evidence or produce witnesses to testify on the same. Reliance has been made on the case of *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 5 MLJ 662 (CA).

[20] In addition, the learned High Court judge invoked s 114(g) of the Evidence Act 1950 following *Marappan a/l Muthusamy v R Sivam a/l Ramasamy* [2014] 4 MLJ 428 by reason of the appellant's failure to call witnesses identified as Lee Hua-Hsiung, Ong Swee Loon and Hoe Hock Lai to convince the court that the agreement had not been annulled contrary to that testified by the respondent's witnesses Siva Kumar a/l Govindan and Sreedharan a/l Nair.

[21] Finally, the learned High Court judge also found that the there was no subsequent or new agreement entered by the parties to replace the annulled agreement. According to the learned High Court judge, the appellant did not satisfactorily respond to the respondent on the drafting of the new agreement as well as procrastinated in contesting the alleged annulment of the agreement.

[22] In the premises, the learned High Court judge therefore found that the respondent had the right to remove the appellant's plant and machinery that was on the land after due notification including to claim storage charges pending their removal following *Tengah Oil and Gas International Pte Ltd v Seawealth Nautical Sdn Bhd & Anor* [2011] 11 MLRH 66.

[23] In view that the appellant has abandoned the land since 2016 as found by the learned High Court judge; hence the respondent's counterclaim of RM20,000 storage charges incurred was allowed.

FINDINGS OF THIS COURT

[24] Before us, both parties primarily repeated their respective submissions made in the High Court.

[25] We have accordingly, in the exercise of our appellate duty and function, reviewed the judgment of the learned High Court judge. In this respect, we are mindful of the following dicta of Raus Sharif FCJ (later CJ) in *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785 (FC):

> [26] Thus, the prime issue in respect of questions 1 to 3 is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32 *Watt or Thomas v Thomas* [1947] AC 484 and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).

As well as the dicta of Zulkelfli Makinudin FCJ (later PCA) in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 (FC) as follows:

> [20] *As regards the first main ground of appeal raised by the appellant, I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings. In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct* (*See Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122). In the present case even though the Court of Appeal took the view that the High Court judgment was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and how it had implicated the appellant. There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from the witnesses called by the prosecution as appearing in the appeal records. I am therefore of the view that the Court of Appeal did not err on this issue. (Emphasis added.)

[26] On the facts here, it is plainly not in dispute that the agreement had been validly entered amongst the parties. The pivotal fact in issue is whether the agreement was thereafter bilaterally declared null and void by the parties.

[27] According to the respondent, the parties mutually agreed at the meetings that the agreement was treated as null and void and a new agreement would be entered. However as far as the appellant is concerned, the agreement would continue to be in force unless and until a new agreement is executed.

[28] We have consequently reviewed the minutes of the meetings in entirety

and noted that there were discussions recorded in both meetings (as per the first item in the agenda) on the parties' express desire to treat the agreement 'no longer valid and will be void' but there was nothing concluded expressly that the agreement is henceforth null and void.

[29] Furthermore, we noted that there were also express discussion and conclusion recorded in the meeting held on 19 May 2016 that 'the new agreement will be drafted by Mr Siva' of the respondent and 'New agreement to be draft out as soonest ...' respectively. At the subsequent meeting held on 31 May 2016, the express discussion and conclusion recorded were that 'New agreement will be done after SSM received from VSKL' and 'New SSM document are required with attached Mr Lee Hua Hsiung as director and major shareholder' respectively.

[30] Apposite thereto, we also noted that there were discussions and conclusions on plant/project and cash flow in the meeting held on 19 May 2016 (as per items second to third in the agenda) as well as on discussions and conclusions on plant/project, deposit payment and quantity changes in contract in the subsequent meeting held on 31 May 2016 (as per items second to fourth in the agenda).

[31] Consequently, we objectively find from the meetings that the presumed intent of the parties is that the agreement still subsisted unless and until replaced by the new agreement. Simply put, it was plain that the parties did not mutually treat the agreement as already null and void. We are persuaded by the wordings as adopted in the minutes of the meetings highlighted above as well as the conduct of the parties in having discussed and settled in the meetings too on various items which are consistent with the ongoing performance of the agreement.

[32] It is also apt for us to refer to s 94 of the Evidence Act 1950 which provides as follows:

> 94 Exclusion of evidence against application of document to existing facts
>
> When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.
>
> *ILLUSTRATION*
>
> A conveys to B by memorandum of transfer 'my estate at Kranji containing 100 acres.' A has an estate at Kranji containing 100 acres. Evidence may not be given of the fact that the estate meant was one situated at a different place and of a different size.

[33] Thus based on s 94 of the Evidence Act 1950, we find that the learned High Court judge fell into error when he found that the appellant suppressed or withheld vital evidence on the meetings and invoked s 114(g) of the Evidence Act 1950 because of the appellant's failure to produce Lee Hua-Hsiung, Ong Swee Loon and Hoe Hock Lai as witnesses at the trial.

[34] That notwithstanding and if oral evidence is admissible to explain the outcome of the meetings, we noted that the respondent's principal witness Siva Kumar a/l Govindan unequivocally testified as follows in cross-examination at trial:

> Q: Sehingga perjanjian baru diderafkan, adakah perjanjian lama diteruskan atau dikekalkan? Sebab Mr Lee yang sepatutnya melakukan kerja semua itu. Jadi sekarang peguam tanya, sehinggalah satu perjanjian baru disediakan, apa jadi dengan perjanjian lama itu, adakah ianya diteruskan, dikekalkan?
>
> A: Ya.
>
> ...
>
> Q: Mengikut keterangan kamu tadi, sehingga perjanjian yang baru dibuat, perjanjian lama itu masih berjalan betul?
>
> A: Ya.
>
> ...
>
> Q: Mengikut keterangan kamu tadi, sehingga perjanjian yang baru itu diadakan maka perjanjian lama itu dianggap bloeh berjalan seperti biasa. Jadi, jawapan kepada soalan ini sepatutnya tidaklah. Tadi, kamu kata perjanjian itu masih terpakai lagi sehinggalah perjanjian baru dibuat, betul?
>
> A: Ya.

[35] He subsequently answered as follows in re-examination:

> Q: ... Soalan saya adakah anda dan Geonex mengambil tindakan lain sebagai perbincangan dengan VSKL atau pun tindakan-tindakan lain berkaitan dengan P1 ini?
>
> A: Ada.
>
> Q: Apakah tindakan yang diambil?
>
> A: Tindakan yang kita ambil, kita ada membuat perbincangan macam perbualan biasa, memberitahu kepada VSKL mengatakan agreement yang lama yang kita buat ini tidak sah, so terpakasa kena buat satu agreement yang baru sebab apa perjanjian yang kita buat lama itu tidak betul dengan perjanjian yang kita sign dekat sana. Sebenarnya agreement yang kita buat dengan VSKL ini pada 2015 bulan 10 hari Deepavali ketiga. Saya sign semua dokumen depan belakang muka surat agreement tetapi apabila diberi kepada kiat pada bulan 2, 2016, Cuma ada sign di belakang sahaja. Yang depan semua satu signatory pun tidak ada. So itu pasal saya minta dia balik satu agreement baru dengan Mr Lee. Saya bagi kontrak ini di atas based on Mr

Lee sebab Mr Lee sahaja yang tahu hendak membuat kontrak macam Hor Lai ke Swee Leong ke, dia orang tidak pandai di dalam bijih besi. So dengan Mr Lee bila saya jumpa memang agreement apa yang kita buat dengan apa yang kita tulis itu tidak betul, so kita buat satu agreement yang baru. So, saya kejar masa dia bagi agreement tapi dia tidak beri agreement. So, saya cakap dengan dia, kita buat satu agreement baru. Kita akan pass ke dia orang agreement itu. Tetapi dia orang pun macam tidak tunjuk initiative untuk mendapatkan agreement baru dan sambung dengan agreement baru. So dia orang stick on that. So, dekat sana saya dapat 2 tempat sudah tahu kena tipu. Sebenarnya agreement itu buat pada 2015 tetapi sign dalam 2016. Sebab stamping pun, ketiga-tiga copy dia orang pun simpan. Dia tidak bagi kita satu proof. Sebab itu kita macam tidak ada bukti mengatakan kita hendak tunjuk dia agreement lama dengan agreement baru.

[36] We hence find the respondent admitted or conceded to the fact that the agreement still subsisted consequential to the meetings unless and until replaced by the new agreement. However, the respondent neither retracted nor clarified on the admission or concession. There was an attempt instead by the respondent to portray that the agreement was not understood and ought therefore to be cancelled. We are not convinced and find that it is irrelevant particularly because the defence of *non est factum* has never been pleaded by the respondent.

[37] In the circumstances, we therefore find that the learned High Court judge has misdirected himself in holding that the parties mutually agreed to annul the agreement.

[38] Consequently, it follows that the agreement had to be performed unless otherwise replaced by a new agreement. It is plain from the meetings that the onus is upon the respondent to draft the new agreement but that was not done.

[39] Furthermore pursuant to the agreement, the respondent was under the obligation jointly with the lessee to renew or extend the permission and rights as an operator to carry out development work and mining operation on the land which have already lapsed. This was not done too.

[40] Nonetheless, there is at all material times neither non-performance nor breach of the agreement seen on the part of the appellant.

[41] In the Federal Court case of *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697; [2007] 6 CLJ 93, Augustine Paul FCJ held as follows:

... *The reason for which a contract is not performed must exist at the time it is terminated* (see *British & Benningtons Ltd v NW Cachar Tea Co* [1923] AC 48). However, the termination of a contract, based upon a reason that is in fact inadequate, may

nevertheless be supported if there are at the time facts in existence which would have provided a good reason (see *Universal Cargo Carriers Corpn v Citati* [1957] 2 QB 401). As the project was aborted at a later stage it cannot constitute a reason for the termination of the agreement. In any event the project was subsequently aborted by the act of the defendant itself in wanting to have a new development concept. The result is that the services of the plaintiff was terminated for reasons brought about by the acts of the defendant itself. In other words the defendant had disabled itself from performing the contract. The critical issue for determination is the validity of the termination of a contract on such grounds. The position where a person disables himself from performing an agreement is governed by s 40 which reads as follows:

> *When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.*

In commenting on the circumstances in which a person may disable himself from performing his promise within the meaning of s 39 of the Indian Contracts Act (equivalent to our s 40) *Indian Contract and Specific Relief Acts* by Pollock & Mulla (11th Ed) Vol 1 says at p 532:

> The principle that in the absence of an express provision in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach (*Alghussein Establishment v Eton College* [1991] 1 All ER 267). (Emphasis added.)

See also *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291; [1985] 1 CLJ 541 (SC).

[42] It is hence trite law of contract that the respondent committed repudiatory breach of the agreement when the respondent via its solicitor's letter dated 29 September 2016 instructed the appellant to cease all mining operations forthwith and thereafter to vacate the land. In other words, the agreement was purportedly terminated but the respondent cannot take advantage of its breach as seen in paras [38] and [39] above to put an end to the contract.

[43] On the facts herein, we find that the appellant had no other option after several attempts to resuscitate the contract between September 2016 and March 2018 but to rescind the agreement when the appellant instituted the suit in the High Court.

[44] As the result, the appellant is entitled to compensatory damages as provided in s 76 of the Contracts Act 1950 as follows:

76. Party rightfully rescinding contract entitled to compensation

A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

ILLUSTRATION

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her RM100 for each night's performance. On the sixth night A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

[45] By virtue of the learned High Court judge's misdirection as found by us in para [37] above, there is obviously non-direction in consequence by the learned High Court judge pertaining to breach of the agreement and resultant claim of damages by the appellant as now found by us in paras [38] to [44] above. Additionally, the learned High Court judge misdirected himself in allowing the counterclaim of storage charges made by the respondent too. In the premises, appellate intervention is justified.

CONCLUSION

[46] It is for the foregoing reasons that we allowed the appeal as so ordered.

Appeal allowed.

Reported by Ashok Kumar